IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent.	)	
vs.	)	APPEAL NO. SC94503
	)	
DEMETRICK TAYLOR,	)	
	)	
Appellant,	)	
	)	

APPEAL TO THE MISSOURI SUPREME COURT,
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF ST LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION
THE HONORABLE MICHAEL DAVID
JUDGE AT TRIAL AND SENTENCING

APPELLANT'S SUBSTITUTE REPLY BRIEF

Amy E. Lowe
Missouri Bar #63423
Assistant Public Defender
1010 Market Street, Suite 1100
St. Louis, MO 63101
Tel. (314) 340-7662
Fax (314) 340-7685
Attorney for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Sources

STATEMENT OF FACTS

Demetrick Taylor stands on the statement of facts in Appellant's Substitute Brief.

Reply Argument For Point One

The trial court erred and abused its discretion when it refused to allow Mr. Taylor to call Nautica Little, his sole intended witness, in that Nautica Little would have offered evidence directly related to the credibility of the officers as to the events of the night of January 25th, 2012, the sole contested issue at trial. Because the trial court excluded Nautica Little, Mr. Taylor was deprived of his rights to due process of law under Mo. Const., Art. I, §§ 10 and 18(a) and U.S. Const., Amends. V and XIV as well as his right to confront witnesses under the United States Constitution, Amend. VI.

In addition to those arguments in Appellant's Substitute Brief, Mr. Taylor replies to the state with the following:

The night of Mr. Taylor's arrest, Nautica Little observed certain actions on the part of police officers. [TR at 210-12,293-5]. She saw her fiancé, George Ford, come in from outside. *Id.* As he was coming in, she heard a commotion. [TR at 211]. When she personally went outside to see what was happening, she observed the officers arresting Mr. Taylor. *Id*. The officers were shouting about a gun. Ms. Little was so concerned about the officers' conduct, she attempted to film them with her phone. When she tried to record what the officers were doing,

the officers took the phone. Neither officer gave an account that described these events.

The State attempts to argue that the proffered testimony would not have contradicted the testimony given by the officers at trial. The record refutes this claim.

Ms. Little's testimony directly contradicts the officer's testimony. The State focuses on the idea that because Officer Clark was never specifically asked if he shouted about a gun, nothing Ms. Little had to say was relevant. This ignores what officer Clark actually testified about. In Officer Clark's version of events, he is on an empty street. [TR at 179]. He sees no one until well after Mr. Taylor is in the police car. [TR at 173-4, 201]. There is no mention of Mr. Taylor being placed on the ground by the car. [TR *passim*]. Once Mr. Taylor is off the fence, the arrest is peaceable. No one films the officers. [TR *passim*]. Officer Clark does not admit he spoke with any other person on the scene until he is confronted with the list of individuals that he checked for warrants that night, after which he has to admit at least talking to George Ford. [TR at 201].

Likewise Officer Chamberlain's testimony is also directly contradicted. First, the state confuses the evidence regarding officer's Chamberlain's testimony about taking Mr. Taylor to the ground. [Respondent's substitute brief at 19]. The state claims officer Chamberlain admitted taking Mr. Taylor to the ground as

described by Ms. Little. [Respondent's brief at 19]. However, this does not seem to be the case. Instead, the transcript seems to reflect Officer Chamberlain repeating Officer Clark's earlier testimony: Mr. Taylor got off the fence, and was handcuffed on the ground, rather than half way up a six foot fence, with vicious dogs on the other side. [TR at 224]. Even if one accepts the State's somewhat strained reading (wherein Mr. Taylor voluntarily climbs down from the fence, and is then taken to the ground by the officers in return for this cooperation) neither officer mentions then taking Mr. Taylor back to the car, again taking him to the ground, and then searching his freshly prone person for a gun some distance from where he was initially arrested and cuffed. [Respondent's substitute brief at 19; TR *passim*].

This is not the only way in which Ms. Little directly contradicts Officer Chamberlain. The officer describes the street as being empty, and does not mention speaking to any other people. He denies talking to anyone else on scene. [TR at 232]. The State argues that Nautica Little's testimony does not directly contradict the officer because he was not asked specifically about Nautica Little. But Nautica Little is a person, and a part of the officer's general denial. If he did not speak to anyone else that night, Nautica Little is a part of "Anyone."

This is not the only place wherein the State takes issue with singular and plural parts of speech. For the first time on transfer the State argues that the offer

of proof is inherently ambiguous. The State asks this Court to read the term "they", referring to two male officers, as an ambiguous third person singular pronoun. [Respondent's Substitute Brief at 16]. The State argues that if the Court reads they as a singular pronoun, or assumes that Ms. Little was only referring to one officer instead of both, then perhaps only one officer was performing the various actions described, rendering Ms. Little's contradictory testimony somehow less important.

The Oxford English dictionary defines "they" as"

"1.used to refer to two or more people or things previously mentioned or easily identified:

2.used to refer to a person of unspecified sex"

"They" *The Oxford English Dictionary*, OED Online, http://dictionary.oed.com, Oxford University Press (January 30 2015).

Here there were two male officers, both previously identified and not of an unspecified sex. Where defense counsel is referring to only one of the two officers he refers to the individual acting alone as "one of the police officers." [TR at 210-1]. The term "they" in context is not ambiguous without accomplished mental gymnastics. "They" refers to the two officers, as a group.

The definition of "they" is not the only place in which the State attacks the offer of proof. [Respondent's substitute brief at 16-19]. In assailing the offer of

proof for the first time on transfer, the State ignores a crucial fact: The Court intervened before Counsel could respond or elaborate to the State's comments on the proposed witness, declared the offer of proof sufficient, and ordered all parties to proceed. [TR at 210-2]. The colloquy went as follows:

> ***[Defense Counsel]*** *In addition she would testify that George Ford and Mr. Taylor know one another; that George Ford considers – well, that she says the relationship between them is stepson. She would then testify that she heard the commotion, she came outside of the residence, she saw that they had Mr. Taylor handcuffed on the ground, that they were shouting about a gun or a weapon.*
>
> *In addition, she pulled out her phone and began videotaping the incident. And one of the police officers seized her phone away from her and told her that she couldn't, that she couldn't videotape it. She would be able to testify that they searched George Ford's truck and also she saw him walk across the street and search the lot across the street and they didn't find anything over there either.*
>
> *The court: All right. What's your reply, Counsel?*
>
> ***[The State]:*** *Your Honor, I believe her testimony to be wholly irrelevant to the point of whether the defendant possessed cocaine or not. A lot of the statements from George Ford to her would be hearsay. George Ford could*

have come in here and testified as to the relationship himself. I also believe that the fact that they come out and see – she apparently comes out and sees the defendant already handcuffed after the crime was committed, so she saw nothing.

The court: *All right. The witness will not be allowed. You made a sufficient record. Your record is overruled and we will proceed.*

[TR at 210-212].

Where an offer of proof is cut short by the trial court, who deems it sufficient, the deficiencies in the offer of proof are not attributable to the defense. *State v. Harris*, 358 S.W.3d 172, 174 (Mo.App. E.D. 2011)("We will not penalize Appellant now for the trial court's unwillingness to hear his offer of proof.") Further, as in *Harris*, the offer in this case was enough to allow Appellate review of the decision. *Harris*, 358 S.W.3d at 174. It was specific enough that Counsel for respondent did not mention any shortcomings in the offer of proof during briefing before the Eastern District, and was able to proceed on the merits. [Respondent's Brief in ED100259 at 13-8]. Neither did the Eastern District find any ambiguity or complain of insufficient information to rule in their Memorandum supplementing their opinion. [*Memorandum* in ED100259 at 4-6].

The State also argues that confiscating a phone and ordering someone not to video tape behaviors is not evidence of any sort of malfeasance or a desire to hide

some illicit action. The attorney general has endorsed mandatory body cameras for police. [The St. Louis Post Dispatch, *Missouri Attorney General Endorses Body Cameras for Police*, (January 28, 2015), retrieved January 31, 2015 at http://www.stltoday.com/news/state-and-regional/missouri/missouri-attorney-general-endorses-body-cameras-for-police/article_c374453b-060b-5ed2-9e13-cb787fc9c35e.html]. In a climate where the State endorses officers to film themselves at all times, one must wonder what legitimate purpose is served by demanding a private citizen stop recording the public conduct of officers.

Certainly, this evidence was relevant to the credibility of both of the officers. As mentioned in Appellant's Substitute Brief, Missouri Courts have long ruled that attempting to destroy evidence, or other evasive behavior is relevant evidence of consciousness of guilt. See e.g. *State v. Mack*, 66 S.W.3d 706, 709 (Mo. 2002)(in the context of reasonable suspicion analysis); *State v. Davidson*, 107 S.W.3d 306 (Mo.App W.D. 2003)(attempting to convince witness not to testify). Whether one believes the officers destroyed evidence, or were merely evasive, their act in trying to avoid being filmed is relevant to their credibility.

The trial court abused its discretion in excluding Ms. Little. As discussed in Appellant's Substitute brief, regardless of if one analyzes her testimony as a separate act of dishonesty by the police, or observation of what occurred the night at issue, Ms Little's testimony was relevant to Mr. Taylor's guilt or innocence.

She was in the hall, and ready to testify. The trial court had enough information before it to know that her testimony was proper evidence. Excluding her prejudiced Mr. Taylor. Even without Ms. Little's testimony, the jury was out for three and half hours solely deciding if the two police offers could be believed. This cause should be remanded for a new trial where Ms. Little is allowed to testify or such other relief as this court sees fit.

Reply Argument for Second Point Relied On

The trial court plainly erred when it announced that it had decided on a sentence before any evidence was given at the sentencing hearing, and made it clear that the evidence at the sentencing hearing would and could not change the sentence that was decided on before Mr. Taylor even entered the courtroom for sentencing that day. Because of this early decision, Mr. Taylor had no meaningful opportunity to present mitigating evidence or argue for a lesser sentence. Any opportunity in the context of these remarks was illusory. This was error in that it violated Mr. Taylor's rights to due process of law pursuant to U.S. Const., Amends. V and XIV and Mo. Const., Art. I, §§ 10 and 18(a), and his rights under U.S. Const. Amends. VI and VIII to be assisted by counsel and free of cruel and unusual punishment.

In addition to those arguments in Appellant's Brief, Mr. Taylor Replies to the state with the following:

The State's version of events is clearly refuted by the record that the state itself provides in its brief. The State asserts that the Court merely informed Mr. Taylor of the sentence it was "leaning to." [Respondant's Substitute brief at 23]. Yet, the Court specifically intervened to correct this impression when the defendant voiced it at sentencing

THE COURT: All right. I'm sure Mr. Taaffe explained to you kind of how I operate, and you already know what sentence you are going to get even before I pronounce it. You already know that, don't you?

THE DEFENDANT: No, sir.

THE COURT: Mr. Taylor, you've been around too long from that. I expect that from my juveniles. I never sentence a defendant without telling the lawyer what I'm going to do beforehand, and I tell the lawyer to always come and tell you so you sit in that box all morning you know exactly what sentence I'm going to give you because he told you, didn't he? Didn't he tell you?

THE DEFENDANT: He told me what you was leaning towards. He didn't say --

THE COURT: All right. So he already told you what I was going to do and so that's – so it's not a surprise when I sentence you. I just, you know, most people that come in here, they think that the defendant is surprised about the sentence, but the defendants are never surprised because I always tell you beforehand [TR at 300-1]

The Court directly contradicted the defendant when he asserted that the sentence the Court told his attorney was merely a helpful statement of what it was leaning towards. In addition the Court unambiguously stated it made a sentencing

decision before the hearing. Respondent's version of events is directly contradicted by the record.

Mr. Taylor requests for these reasons and the reasons voiced in appellants brief that this case be remanded to the circuit court for new sentencing, new trial, or whatever relief this court sees fit to grant.

CONCLUSION

WHEREFORE, based on the argument as set forth in this brief and appellant's initial brief, appellant Demetrick Taylor respectfully requests this Honorable Court reverse his conviction and remand this case for a new trial or such other relief as this court sees fit.

Respectfully submitted,

/s/ Amy E. Lowe_____
Amy Lowe
Missouri Bar #63423
Assistant Public Defender
1010 Market Street, Ste. 1100
St. Louis, MO 63102
Tel. (314) 340-7662
Fax (314) 340-7685

Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that on this 31st day of January 2015 a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, jennifer.rodewald@ago.mo.gov, via the Missouri e-filing system, care of Ms. Jennier Rodewald, Office of the Attorney General.

/s/ Amy E. Lowe_____
Amy E. Lowe

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 14 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 2715words, and 17 pages including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software and found virus-free.

/s/ Amy E. Lowe_____
Amy E. Lowe
Missouri Bar #63423
Assistant Public Defender
1010 Market Street, Ste. 1100
St. Louis, MO 63102
Tel. (314) 340-7662
Fax (314) 340-7685

Attorney for Appellant